

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1421

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS WATSON,

Appellant.
-----X

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PJS

BRIEF FOR APPELLANT LOUIS WATSON

Appeal from A Judgment Of
Conviction In The United
States District Court For
The Southern District Of
New York

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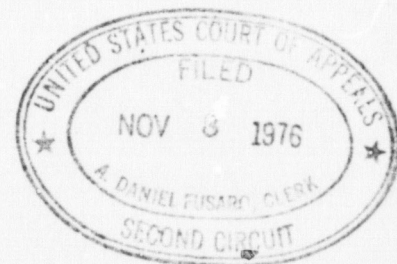


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UNITED STATES OF AMERICA,

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Docket No. 76-1421

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BRIEF FOR APPELLANT LOUIS WATSON

Louis Watson appeals from his conviction on September 16, 1976, in the United States District Court for the Southern District of New York (Ward, J.) upon a jury verdict on one count of robbing a federally insured bank 18 U.S.C. 2113(a), and a second count arising from his use of a weapon during the robbery, 18 U.S.C. 2113 (d). His sentence was ten years on Count One, and one day consecutive probation on Count Two. Counsel on this appeal is assigned under the C.J.A.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to dismiss the indictment for failure of the Government to comply with the Southern District Prompt Disposition Rules?*

2. Whether the district court erred in refusing to honor the jury's request to hear defense counsel's comments on summation on an incriminating photograph?

*And the Interstate Agreement on Detainers (Point IV, infra).

3. Whether in light of Prince v. United States, 352 U.S. 322 (1957), the district court erred in imposing a consecutive probation on Count Two?

STATEMENT OF FACTS

On June 5, 1975 several men held up a branch of the First National City Bank at 334 Fifth Avenue, New York City. The Government's evidence at trial -- bank photographs, incriminating statements by Watson to FBI agents -- was sufficient for the jury's conclusion that Watson was involved.* There was a further issue, however, of whether the Government had been ready in the time required by the District's Prompt Disposition Rules. After a hearing on the issue the district court denied Watson's motion to dismiss the indictment on that ground.**

The chronology, as developed in the various affidavits and post trial hearing, was as follows:

1. The robbery took place June 5. On August 1 an accomplice in Philadelphia implicated Watson. On August 4 a complaint issued from the United States District Court for the Eastern District of Pennsylvania charging Watson with the robbery. A warrant for his arrest issued that same day. (Bentley Affidavit of August 12, 1976 Opposing Defendant's Motion, hereinafter Bentley Aff., par. 3).

* A co-defendant, Willie London, was acquitted.

** Although the motion was made prior to trial, the court held the hearing after the jury returned its adverse verdict.

2. Pennsylvania State Police arrested Watson on November 12. On November 13 the FBI was informed of his confinement at the County Jail and FBI agents interviewed him there on that date (Bentley Aff. pars. 4-6).

3. The Government writted Watson to the Pennsylvania Eastern District Court for a bail hearing on November 25, 1975. The magistrate appointed counsel, set bail at \$75,000.00 and scheduled a preliminary hearing for December 4, 1975. (Bentley Aff. par. 7).

4. On November 26 or 27, Michael Daniels, Watson's assigned counsel, told Assistant United States Attorney Dennis, in Philadelphia, that Watson would be willing to plead guilty to the bank robbery charge if various state charges could be consolidated into one federal charge in Philadelphia (666).^{*} Dennis was to consider this with the United States Attorney's Office in New York and get back to Daniels (667).

5. By the December 4 preliminary hearing no agreement had been reached. Daniels said that Watson had no alternative but to transfer to New York, and would waive the transfer hearing. However, there was no final communication between Dennis and Daniels terminating discussions until December 12, a week later (644,715). In the meantime, the marshal had returned Watson to state custody (Bentley Aff. par. 11).

^{*} Numbered references are to the trial transcript. A designates the Appendix to this Brief.

6. The indictment in this district was filed on December 31, 1975. Not until March 26, 1976, however, did the Government issue a writ to obtain Watson from state custody at the Graterford Correctional Institution in Pennsylvania, where he had eventually arrived after being returned to state custody.* The writ was returnable April 5. The writ was returned unexecuted because from March 29 to April 14 Watson was in the custody of the Philadelphia District Attorney (Bentley Aff. par. 18-19).

7. At the end of May, Judge Ward notified the Government of a Watson pre-trial conference scheduled for June 16. The Government prepared a new writ, which produced Watson from state custody on that date. Since Watson was without counsel, the court adjourned the conference to June 22 and assigned counsel shortly thereafter. The Government finally filed its notice of readiness on June 28, 1976.

In denying Watson's motion to dismiss (A 30), the district court held that the six month readiness requirement could not commence before December 4, and did not commence until December 12, 1975, when the Rule 20 disposition discussions terminated; that the period from March 29 to April 14 when the Government's writ was returned unexecuted had to be excluded since defendant was then on trial in Philadelphia; and that the period after June 16 also had to be excluded since this was a period to permit Watson to obtain

* The U.S. Attorney in this district thought Watson was still in federal custody and did not track him down for several weeks.

an attorney. These calculations made timely the Government's readiness notice of June 28.

ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE CALCULATED
THE SIX MONTH PERIOD WITHOUT REGARD TO
THE RULE 20 DISCUSSIONS. PROPER CALCULA-
TIONS MANDATED DISMISSAL FOR VIOLATION
OF THE PROMPT DISPOSITION RULES

The district court, we submit, made at least three erroneous calculations in judging the timeliness of the Government's notice. The most important concerns its view of the Rule 20 discussions.

First, the six month period should have started to run on November 25, 1975 when Watson was first brought before the Eastern District magistrate. A complaint had been issued, as contemplated by Rule 5. An arrest had been made. His presence in the federal court had been secured.

The Rule 20 discussions had no bearing. Although Prompt Disposition Rule 3 uses rejection of a Rule 20 disposition to commence the ninety day trial time of a high risk defendant, neither Rule 5 nor Rule 6 mentions it with respect to the six months given the Government to file its notice of readiness, and the discussions between Daniels and Dennis about a possible plea could not rise to the status of an exclusion so as to save the Government the time from November 25 to December 12. See United States v. Oliver,

523 F. 2d 253, 258-59 (exclude part of period of Rule 20 discussions not because of such discussions but because defendant's counsel agreed to continuances of removal hearing).*

Second, the court should not have excluded the March 29-April 14 period when the writ could not be executed because Watson was on trial in Philadelphia rather than at Graterford. The Rule 6 (a) exclusion for "trial of other charges" does not apply. The language of that section makes clear that it governs appeals, motions and other delays over which the district court can either exert some control (e.g., pre-trial motions), or gear the schedule of the case accordingly. That includes defendant's other trials, either in the same courthouse or elsewhere, in the federal courts. See United States v. Cangiano, 491 F. 2d 906 (2d Cir. 1974). ^{States} United/ v. Knight, 529 F. 2d 594 (2d Cir. 1975). It could hardly have been intended to apply to the fortuitous coincidence that when the Government finally sought to bring Watson to the Southern District for the first time, he was on trial on a Philadelphia City charge which was later dismissed (739).

Third, the court should not have applied a blanket exclusion of the additional days after June 16. Counsel was assigned by June 22 so that the exclusion, at most, was six days (730). Rule 6 (g).

The result of the foregoing is as follows:

* In this case, the removal hearing was set for December 4 and did not go beyond that day. There were no continuances. There was, moreover, no "cooperation" of the type which has given the Government more time to file its notice. United States v. Valot, 481 F. 2d 22 (2d Cir. 1973).

The six month period started to run on November 25, 1975 so that the Government's readiness notice should have been filed by May 25, 1976. Even if we are wrong about the Philadelphia trial and the excludable period from March 29 to April 14, this would only give the Government sixteen extra days, which would take it to June 9. Giving the Government six extra days for assignment of counsel would only bring it to June 15. No matter how calculated, therefore, the Government's June 28 filing was untimely. United States v. McDonough, 504 F. 2d 67 (2d Cir. 1974)*

*We have addressed only the points ascribed in the district court opinion. We will deal with any other claimed exclusions when and if they are argued in this Court.

POINT II

THE DISTRICT COURT ERRED IN REFUSING THE
JURY'S REQUEST TO HEAR PART OF DEFENSE
COUNSEL'S SUMMATION

The jury deliberations began at 2:30 P.M. on July 22, continued until 11 P.M. that night and went on all the next day. This demonstrated the closeness of the issues in the jury's minds.

A crucial piece of evidence for the Government was a surveillance photograph. According to an FBI agent, Watson, when shown that photograph, admitted that he was in it. During its deliberations the jury asked to hear the agent's testimony in that regard, as well as the portion of Watson's counsel's summation explaining away the picture (A33). The district court had the testimony read, but refused to grant the jury's request for the summation on the grounds it was not evidence (A33-34).

This was error. The issue was close, the picture was crucial, and the jury believed counsel's remarks could better enable it to evaluate the evidence. If, for example, the court had marshalled the evidence in its charge and the jury had requested that, it would have been read notwithstanding that it was not an instruction on the law and not evidence. The same result should have obtained here. The district court's failure in this regard requires reversal.

POINT III

THE DISTRICT COURT WAS BARRED FROM IMPOSING SENTENCES ON BOTH COUNTS ONE AND TWO

Although it's a very minor point, and we are aware of no specific unfavorable consequences to Watson beyond the threat of imposition of a sentence on Count Two should he commit a probation violation on the one day following his ten year sentence, still, to guard against that remotest of possibilities this Court must vacate the sentence on Count Two. Prince v. United States, 352 U.S. 322 (1957) holds that a defendant may not be sentenced both for robbing a bank and entering with intent to rob (18 U.S.C. 2113 (a)). United States v. Pravato, 505 F. 2d 703 (2d Cir. 1974) and Gorman v. United States, 456 F. 2d 1258 (2d Cir. 1972) (vacation of three minute probation) demonstrate that sentences on both a 2113 (a) count and a 2113 (d) count cannot stand either.*

* Although this Court can simply vacate the sentence on Count Two, it may also remand to Judge Ward for resentencing. Gorman v. United States, supra.

POINT IV

THE DISTRICT COURT ERRED IN HOLDING
THAT THE INTERSTATE AGREEMENT ON DE-
TAINERS APPLIED ONLY TO STATE PRISONERS
WHO HAD COMMENCED SERVING A TERM.

In United States v. Mauro, Docket 76-1251, October 26, 1976, this Court held that the Government must try a state prisoner writtten from state custody prior to returning him to the original place of imprisonment and must do so within 120 days of securing federal custody. Interstate Agreement on Detainers, 18 U.S.C. App., Article IV (c), (e).

The Government failed to comply with Article IV in both respects. It returned Watson to state custody before trying him, and it did not try him within 120 days of its original writ. It sought to avoid the consequences of these acts by arguing that Article IV applies only when state confinement is pursuant to a state sentence as distinguished from pre-trial detention (Watson's case). The district court agreed (63).

We appreciate that Article IV speaks of "a term of imprisonment" and that Watson was not yet serving such a term when he first entered federal custody. We submit, however, that the purposes the Article was to serve, as discussed in Mauro, ought to obtain equally in Watson's situation. His further state proceedings were colored by the pendency of the federal charge. And by turning him back to the state before his federal charge was disposed of, the Federal Government delayed his trial to his prejudice.

CONCLUSION

The conviction should be reversed and the indictment dismissed on account of the Government's failure to comply with the Prompt Disposition Rules. Barring that, a new trial should be ordered because of the district court's error with regard to summation. In any event the sentence on Count Two should be vacated.

Respectfully Submitted,

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